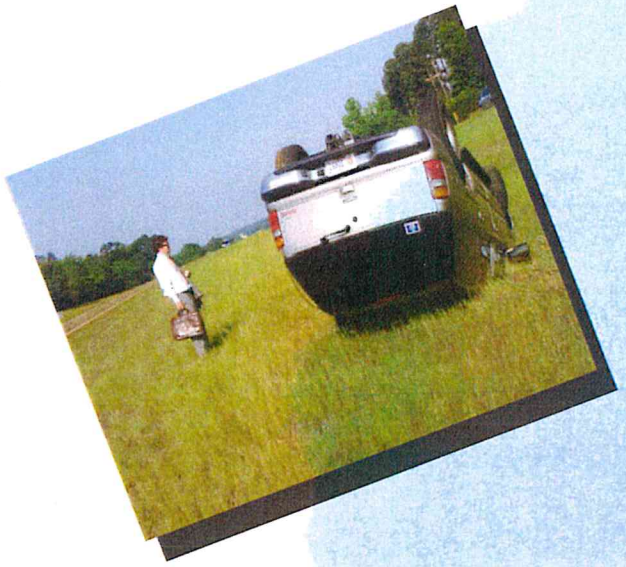
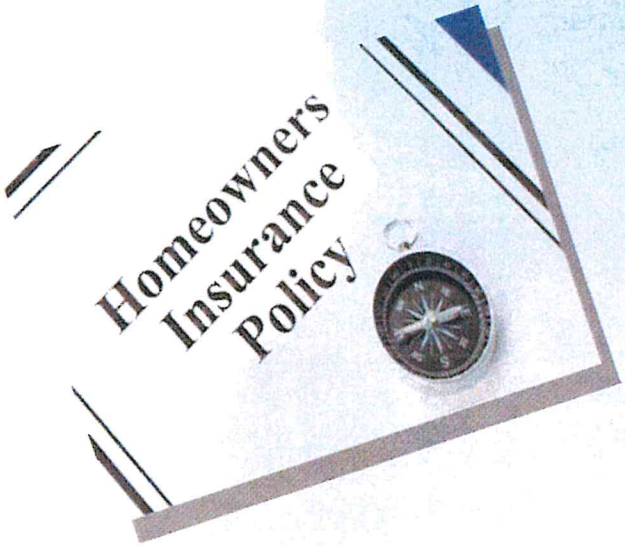
SUMMARY OF MISSISSIPPI LAW

AN A TO Z GUIDE OF INSURANCE-RELATED TOPICS





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Jonathan is a frequent speaker and writer for the National Business Institute presenting continuing legal education courses to other lawyers concerning insurance litigation, including, Litigating the Insurance Claim; Insurance Coverage Litigation (NBI, 2006); Interpreting Coverage Under the Insurance Contract (NBI, 2006); Insurance Policy Interpretation, Nuances that Impact Your Case (NBI, 2006); Defend UM/UIM Cases - And Win (NBI, 2007); Avoid Ethical Potholes, Settling Uninsured and Underinsured (NBI, 2007); and Ethics for the Modern Day Lawyer (University of Mississippi, CLE). Jonathan works with the University of Mississippi Law School Moot Court Board as a competition coach and instructor.

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Brad's primary area of practice is insurance coverage and defense, including uninsured motorists law, and defending automobile, homeowners and premises liability claims.

In 2014, Brad was chosen as the winner of the 2014 Corporate INTL Magazine Global Award: *"Civil Trial Attorney of the Year in Mississippi."* The Corporate INTL Global Awards commemorate excellence by the world's leading advisers who throughout the past 12 months have demonstrated superior client service and legal knowledge.

Brad received his Law Degree, with honors, from the University of Mississippi School of Law in 1995. He received his Bachelor of Science degree in Economics from Clemson University in 1992, with senior departmental honors.

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Brad has authored numerous articles concerning insurance litigation, including *Litigating the Insurance Claim*, R. Bradley Best and Jonathan S. Masters, Insurance Coverage Litigation, National Business Institute, July 2006; and *Interpreting Coverage Under the Insurance Contract*, R. Bradley Best and Jonathan S. Masters, Insurance Coverage Litigation, National Business Institute, July 2006. In 2010, he authored *A Summary of Mississippi Law: An A to Z Guide of Insurance-Related Topics.*

Brad currently serves as the President of the Mississippi Defense Lawyers Association.

Summary of Mississippi Law

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Caution:

The information contained in publication is for general guidance on matters of interest only. The application and impact of laws can vary widely based on the specific facts involved. Given the changing nature of laws, rules and regulations, there may be omissions or inaccuracies in information contained in this report or laws may have changed or been reinterpreted. Accordingly, the information in this report is provided with the understanding that the authors are not herein engaged in rendering legal, tax, or other professional advice and services. As such, it should not be used as a substitute for consultation with legal or other competent advisers. Before making any decision or taking any action, particularly before denying any first-party claims, you should consult with your in-house counsel or the attorneys at Holcomb Dunbar.

Animals

Domestic Animals

Mississippi follows what is referred to as the "one free bite" rule. In other words, if you did not know that your dog would bite someone, you are not responsible for that first injury. However, all that is required is actual or constructive knowledge of a dangerous propensity, which can be much less than an actual bite. Furthermore, the injury can be something other than a bite, including being scratched or knocked over.

There must be some proof that the domestic animal has exhibited some dangerous propensity or disposition prior to the complained of incident, that the owner knew or should have known of this propensity or disposition, and that the owner should have foreseen that the animal was likely to injure someone. *Poy v. Grayson*, 273 So. 2d 491, 494 (Miss. 1973).

It has been held that a dog aggressively growling or chasing after a person is enough to create a jury question whether there was actual or constructive notice of a dangerous propensity. *Mongeon v. A & V Enterprises, Inc.*, 733 So. 2d 170, 172-73 (Miss. 1997).

Livestock (Horses, Cows, etc.)

There is a presumption of negligence against the owner of livestock loose on a federal or state highway or highway rights-of-way which cause damage to property. This presumption does not apply to county roads. The burden is on the owner to show that he was not negligent, *see* Miss. Code Ann. § 69-13-111, for example, by showing that his fence was in good repair and that he regularly and properly maintained it.

Strict liability applies to trespassing livestock. *See* Miss. Code Ann. § 69-13-19. For example, if a livestock owner's cow or horse eats or tramples the crops on the property of another, liability will be automatic.

Non-domestic animals

Owners of wild animals are strictly liable for the personal injury caused by them. *Byrnes v. City of Jackson*, 140 Miss. 656, 105 So. 861, 863 (1925). For example, an owner would be strictly liable for the injury caused by their pet black bear even if the bear was not known to have a dangerous propensity.

Assignments

Generally, Mississippi law allows for the assignment of personal claims, including injury claims. Miss. Code Ann. § 11-7-3. Wrongful death claims, however, are not assignable. *Coleman*

Powermate, Inc. v. Rheem Manufacturing Co., 880 So. 2d 329 (Miss. 2004). Only those individuals listed in the wrongful death statute can bring a wrongful death cause of action. *Id.*

There is no hospital or medical lien statute in Mississippi. However, a valid assignment of a person's right to recover for medical expenses to a medical provider is enforceable.

Mississippi recently enacted an amendment to the Health Insurance statutes, §§ 83-9-3, and 83-9-5, to prevent any health insurance policy from containing provisions that restrict an insured from assigning benefits to a health care provider. In addition, the statute permits an insured to provide the health insurance carrier with a written directive to pay the health care provider all or a portion of the policy benefits that have been so assigned. These new amendments to the statutes became effective July 1, 2013. They appear to only be applicable to health insurance policies and not automobile or other insurance policies.

In 2014 these Health Insurance statutes were amended again (§§ 83-9-3, and 83-9-5), to insert a provision requiring insurance carriers doing business in Mississippi to honor assignments for a period of 1 year from the dates of the assignment or until the insured revokes the assignment. This provision became effective July 1, 2014. Again, these sections apply to health insurance and do not appear applicable to automobile insurance policies.

Automobile Guest

There is no "Guest Statute" in Mississippi. A driver owes passengers a duty of ordinary care. *Hatcher v. Daniel*, 87 So. 2d 490, 492 (1956).

A passenger assumes the risks of obvious danger not created by the driver. *Griffin v. Holliday*, 233 So. 2d 820, 822 (Miss. 1970).

Contributory negligence rules may apply when passenger fails to exercise reasonable care for his own safety, i.e. riding with an obviously intoxicated driver. *Hill v. Dunaway*, 487 So. 2d 807, 811 (Miss. 1986).

Bad Faith

Punitive damages are available to the insured in addition to the amount of the claim in some cases when the insurance company wrongfully refuses to pay a claim. The jury may consider these damages only when the evidence has established that the insurer acted with (a) malice or (b) gross negligence or reckless disregard for the rights of others. *Scott v Transport Indemnity Co.*, 513 So. 2d 889 (Miss. 1987). *See also*, Miss. Code Ann. § 11-1-65, regarding punitive damages.

If the insurer has a "legitimate or arguable reason" for denying the claim, the insurer cannot be liable for bad faith. *Jenkins v. Ohio Cas. Ins. Co.*, 794 So. 2d 228 (Miss. 2001). It is important to

document all support and explanation for denying or delaying a claim. *See also* Negligent Investigation.

Excess Verdicts

When a suit covered by a liability insurer is for an amount in excess of the policy limits, and an offer of settlement is made within the policy limits, the insurer has a fiduciary duty to look after the insured's interest to the same extent as its own, and also to make a knowledgeable, honest and intelligent evaluation of the claim in consideration with its ability to do so. A failure to do this may subject the carrier to all damages, even in excess of the policy. *Hartford Acc.& Indem. Co. v. Foster*, 528 So. 2d 255, 265 (Miss. 1988).

Extra-contractual damages – Mistake or Clerical Errors

A carrier can be liable for certain expenses incurred by an insured even if the conduct falls short of bad faith or punitive conduct. If an insurer's failure to pay a claim was the result of a mistake or clerical error, the insurer may be liable for extra-contractual damages caused by anxiety resulting from the delay in payment. Additional expenses including attorney's fees which are reasonably incurred in an effort to correct the mistake may also be recovered. These kind of damages are often referred to as "Veasley damages" after the case that created the rule. *Universal Life Ins. Co. v. Veasley*, 610 So. 2d 290, 295-96 (Miss. 1992).

Negligent Investigation

An insurer has a duty to perform an adequate and prompt investigation of an insurance claim. The denial of a claim without the proper investigation may give rise to punitive damages. *Gilbert v. Infinity Ins. Co.*, 769 So. 2d 266, 269 (Miss. App. 2000) (citing *Bankers Life & Casualty Company v. Crenshaw*, 483 So. 2d 254, 276 (Miss. 1985)).

"Obviously, some delay in evaluating claims is inevitable, legitimate and socially useful. Insurers are entitled, and in fact legally obligated, to investigate fully the legitimacy of claims, and some skepticism in evaluating claims is appropriate. Since an insurer has an obligation under Mississippi law to investigate claims, discharging that duty is not bad faith. However, an inadequate investigation of a claim may create a jury question on the issue of bad faith." *Pilate v. American Federated Ins. Co.*, 865 So. 2d 387 (Miss. App. 2004) (quoting Jeffrey Jackson, Mississippi Insurance Law § 12:5 (2001)).

At a minimum, the insurer must determine whether the policy provision at issue has been voided by state or federal court, interview its agents and employees to see if they have knowledge relevant to the claim, and make a reasonable effort to secure all relevant medical records before denying the claim. *Eichenseer v. Reserve Life Insurance Co.*, 682 F.Supp 1355, 1366 (N.D. Miss. 1988).

See also Delay of Payment of Claim

Delay of Payment of Claim

Although Mississippi courts are skeptical of such claims, they have permitted claimants to recover damages on bad faith claims when resolution of an insurance claim is merely delayed rather than ultimately denied. See, e.g., *Travelers Indem. Co. v. Wetherbee*, 368 So. 2d 829, 834–35 (Miss. 1979) (affirming jury award for punitive damages where insurer withheld payment for eight months); *AmFed Cos., LLC v. Jordan*, 34 So. 3d 1177, 1191 (Miss. App. 2009) (affirming trial judge's decision to submit punitive damages issue to the jury in a delay-of-payment case); *Pilate v. Am. Federated Ins. Co.,* 865 So. 2d 387, 400 (Miss. App.2004) ("[T]here may be cases where a delay [of payment for one month] could possibly be sufficient grounds for a bad faith claim."); see also *Essinger v. Liberty Mut. Fire Ins. Co*., 529 F.3d 264, 271 n.1 (5th Cir. 2008) (citation omitted) ("Inordinate delays in processing claims and a failure to make a meaningful investigation have combined to create a jury question on bad faith."); *but see Tutor v. Ranger Ins. Co.*, 804 F.2d 1395, 1399 (5th Cir. 1986) (per curiam) (reversing jury's punitive damage award where payment was delayed during an ongoing dispute between insured and insurer); *Caldwell v. Alfa Ins. Co.,* 686 So.2d 1092, 1098 (Miss. 1996)(affirming grant of summary judgment where insurance company delayed payment for three months in complex wrongful death claim, including a six-week delay after it completed its investigation).

A recent Federal Court case in the 5th Circuit analyzed a delay in payment of a UM claim by State Farm. The court found several 3 to 6 month periods of delay in the 3 year claims history that State Farm had no arguable or legitimate basis for. Accordingly, these gaps of unjustified delay and inactivity created a jury question of bad faith against the carrier. *See James v. State Farm*, 743 F.3d 65 (5th Cir. 2014).

A delay is not attributable to an insurer where the insured or his counsel refuses to cooperate or provide the necessary information. If an insured's lawyer advises the insurer to stop its investigation pending his sending medical records, the resulting delay until the lawyer sends the records is attributable to the insured. However, as the burden is on the insurer to gather all necessary medical records, if the insurer fails to inform the lawyer of critical information necessary to further its investigation, the delay in obtaining that information is not attributable to the lawyer but to the insurer. *See James v. State Farm*, 743 F.3d 65 (5th Cir. 2014).

Cancellation

Cancellation/Auto

The statutory cancellation scheme for auto policies applies once the initial policy has remained in effect for 60 days. Miss. Code Ann. § 83-11-3(2). Cancellation may be for *any reason* prior to the 60th day of the initial policy term as long as it is mailed or delivered by the insurer prior to that date. *Id.*

Once the 60 day time period has passed an insurer may only cancel a policy based on (1) nonpayment of a premium; (2) the suspension or revocation of an insured's driver's license or motor vehicle registration, or (3) the insured's failure to make timely payment of dues to an association or organization as required by the policy. Miss. Code Ann. § 83-11-3(1).

Cancellation requires 30 days notice for any reason other than non-payment of premium. Cancellation for non-payment of premium requires at least 10 days notice. Miss. Code Ann. § 83-11-5.

Cancellation/Homeowners

Miss. Code Ann. § 83-5-28 applies the above general guidelines to cancelations, reductions, or non-renewals of liability insurance coverage, fire insurance coverage, or single premium multiperil insurance coverage.

Non-Renewal

Notice of non-renewal must be given at least thirty (30) days in advance. Miss. Code Ann. § 83-11-7. Renewal of a policy shall not constitute a waiver or estoppel with respect to grounds for cancellation which existed before the effective date of such renewal. Miss. Code Ann. § 83-11-7. Cancellation for non-payment of premium requires at least 10 days notice. Miss. Code Ann. § 83-11-5.

Comparative Negligence

Mississippi is a pure comparative fault jurisdiction. A claimant 99% at fault may recover 1% from a responsible party. Damages will be diminished by the jury in proportion to the amount of negligence attributable to the person injured. Miss. Code Ann. § 11-7-15. *See also*, Joint and Several Liability.

Consortium

Damages for loss of consortium include conjugal rights, and a broad range of services performed by the spouse, in addition to intangible mental and emotional damages. *Coho Resources, Inc. v. McCarthy*, 829 So. 2d 1, 20 (Miss. 2002) (citing *Tribble v. Gregory*, 288 So. 2d 13, 16-17 (Miss. 1974)).

In a loss of consortium action, the plaintiff's recovery is reduced by the relative percentage of the injured spouse's comparative negligence. *Choctaw, Inc. v. Wichner*, 521 So. 2d 878 (Miss. 1988).

Losses of consortium claims are not separate occurrences under the terms of a standard insurance policy. The claim of the injured person as well as the spouse are payable under the same "per person" limit. *Crum v. Johnson*, 809 So. 2d 663, 666 (Miss. 2002).

Contribution

The right of contribution exists between those held jointly liable in a judgment. A defendant will be liable for contribution to other joint defendants only for the percentage of fault assessed to him. Miss. Code Ann. § 85-5-7(4). The right of contribution exists between those held joint and severally liable due to defendants acting in concert. Miss. Code Ann. § 85-5-7(6).

Cooperation and Assistance

A breach of the cooperation clause in an insurance contract is considered a material breach if prejudicial to the defense and relieves the insurer of the duty to defend or indemnify its insured under the policy. *State Farm Mut. Auto. Ins. Co. v. Commercial Union Ins. Co.*, 394 So. 2d 890, 893 (Miss. 1981). However, non-prejudicial misrepresentations will be considered immaterial. *Id.*

The insurer bears the burden of showing both attempted diligence in securing the insured's cooperation, and failure of the insured to cooperate in a material matter. *Nationwide Mut. Ins. Co. v. Tillman*, 161 So. 2d 604, 616 (Miss. 1964).

The insured may also breach the cooperation clause by misrepresenting facts surrounding the accident or by collusively assuming liability for the accident. *Employers Mut. Cas. Co. v. Ainsworth*, 164 So. 2d 412, 418 (Miss. 1964). However, unintentional misrepresentations do not establish a breach of the duty to cooperate, especially if the insured promptly corrects the misrepresentations. *Id.*

Courts

Mississippi has a two-tier appellate court system, the Mississippi Supreme Court and the Mississippi Court of Appeals. Decisions of the Chancery, Circuit, and Court of Appeals may be appealed to the Supreme Court. Supreme Court: 9 judges, Court of Appeals: 10 judges. Circuit Court has a jurisdictional minimum of $200 and no maximum. Miss. Code Ann. § 9-7-81. County Court has a jurisdictional limit of $200,000. Miss. Code Ann. § 9-9-21. Justice Court has jurisdiction over small claims of $3,500 or less. Miss. Code Ann. § 9-11-9.

Damages

Caps

Mississippi has a cap on non-economic damages (i.e. pain and suffering, etc.) of $1,000,000 for all actions other than medical malpractice. Miss. Code Ann. § 11-1-60.

Medical malpractice claims have a non-economic damage cap of $500,000. Miss. Code Ann. § 11-1-60.

There are no limits to economic damages (past, present or future medicals, lost wages, etc).

Punitive damage caps are based on the defendant's net worth, as follows:

Net Worth	Cap
Over $1 Billion	$20,000,000
$750 M - $1 Billion	$15,000,000
$500 M - $750 M	$5,000,000
$100 M - $500 M	$3,750,000
$50 M - $100 M	$2,500,000
$50 M or Less	2% of Net Worth

Miss. Code Ann. § 11-1-65.

Collateral Source Rule

The Collateral Source Rule is a general rule that prohibits the admission of evidence that the claimant received compensation for a source other than the damages sought against the defendant. Thus, a defendant may not show that a portion of the medical bills claimant seeks to recover have been paid by others. *Eaton v. Gilliland*, 537 So. 2d 405 (Miss. 1989).

However, if a claimant has *assigned* the right of recovery to certain payments (i.e. medical bills, insurance payments, etc.) he may not attempt to collect them or claim them as part of his damages. They are no longer his claim and the assignee "own[s] absolutely the right to recover

for damages." In other words, if a claimant has legally transferred his right to collect portions of his damages, then he can no longer claim them as damages. *McDonald v. Southeastern Fidelity insurance Co.*, 606 So. 2d 1061 (Miss. 1992). That other entity owns the claim and it has the right to sue for such damages.

Punitive Damages

The plaintiff must show by clear and convincing evidence that the defendant acted with actual malice; acted with gross negligence that shows willful, wanton, or reckless disregard for the safety of others; or committed actual fraud in order to recover punitive damages. Miss. Code Ann. § 11-1-65.

The obligation to pay punitive damages may be excluded by appropriate language in the policy. *Shelter Mut. Ins. Co. v. Dale*, 914 So. 2d 698 (Miss. 2005). If the policy does not exclude punitive damages, Mississippi courts have held that it is not against public policy to insure against such damages, and a policy will be held to cover them.

The United States Supreme Court has placed some additional restrictions on the size of punitive damage awards as they relate to actual damages. The Court has held that rarely will anything more than a 1:1 ratio be reasonable and almost certainly nothing more than 9 times the actual damages will be held constitutional. There are exceptions to exceptionally egregious conduct or cases with extremely minimal actual damages. *State Farm Mut. Auto . Ins. Co. v. Campbell*, 538 U.S. 1513, 1524 (2003).

See also Bad Faith.

Emotional Distress

The emotional distress must always be a reasonably foreseeable result of the defendant's conduct. *Adams v. U.S. Homecrafters, Inc.*, 744 So. 2d 736 (Miss. 1999).

Mississippi law is unclear as to whether a physical manifestation of harm is required for negligent infliction of emotional distress. The court has applied a permissive view which permits recovery solely based on evidence of mental injury and a restrictive view requiring some sort of physical manifestation or demonstrable harm. See *Edmonds v. Beneficial Mississippi, Inc.*, 212 Fed.Appx. 334, 337-38 (5th Cir. 2007) for a discussion of Mississippi law on this topic.

What is clear is that a claimant must offer "substantial proof" of emotional harm, *Ill. Cent. R.R. Co. v. Hawkins*, 830 So. 2d 1162, 1174 (Miss. 2002), and the emotional injuries must be reasonably foreseeable from the defendant's actions. *Adams*, 744 So. 2d at 742-43.

The Mississippi Supreme Court has held that vague complaints of sleeplessness, nightmares, worry and multiple visits to a doctor were insufficient to prove emotional harm. *Ill. Cent. R.R. Co.*, 830 So. 2d at 1174.

Diminution of Value

Loss of a vehicle's value due to being in an accident is a recoverable damage. If despite the repairs there remains a loss in value, that deficiency is recoverable. *Potomac Ins. Co. v. Wilkinson*, 57 So. 2d 158, 160-61 (Miss. 1952).

The measure of loss to an automobile damaged but not destroyed by a collision is the difference between its reasonable market value immediately prior to the collision and its reasonable market value after all reasonable and feasible repairs have been made. *Calvert Fire Ins. Co. v. Newman*, 124 So. 2d 686, 688 (Miss. 1960). See also *Blakely v. State Farm Mut. Auto Ins. Co.*, 406 F. 3d 747, 752 (5th Cir. 2005). (The Fifth Circuit in applying Mississippi law distinguished *Wilkinson* on the basis that the policy language in the present case expressly limited the definition of "repair" and "cost of repair").

Direct Action

There is no direct action allowed by third parties in Mississippi, except to contest a coverage issue. *Kaplan v. Harco Nat. Ins. Co.*, 716 So. 2d 673, 677 (Miss. Ct. App. 1998).

Dram Shop

See Liquor Liability.

Driver's License Suspension

See Judgment Causing License Suspension.

Driver Safety Laws

Bicycle Safety

In 2010, Mississippi enacted the "John Paul Frerer Bicycle Safety Act." A person riding a bicycle upon a roadway generally has all of the rights and is subject to all the responsibilities of a driver of a vehicle. Miss. Code Ann. § 63-3-1303.

If a designated bicycle lane exists, the operator of a motor vehicle may not block the lane to oncoming bicycle traffic and shall yield to a bicyclist before entering or crossing the lane. Miss. Code Ann. § 63-3-1305.

Bicyclists operating a bicycle on a roadway at less than the normal speed of traffic shall ride as close as practicable to the right-hand curb unless it is unsafe to do so, when passing another bicyclist, when preparing to make a left hand turn or when proceeding straight in a place where right hand turns are permitted, and when necessary to avoid a hazardous condition. Miss. Code Ann. § 63-3-1307. Further, bicyclists should not ride more than two abreast, except on paths or roadways exclusively for bicycles. *Id.*

When passing, motorists are required to leave a safe distance of not less than three feet between the vehicle and bicycle. Further, a motor vehicle may pass a bicycle in a non-passing zone when it is safe to do so. And a motorist that passes a bicycle may not make a right turn unless the turn can be made with reasonable safety. Miss. Code Ann. § 63-3-1309.

It is unlawful to harass, taunt or maliciously throw an object at or in the direction of any person riding a bicycle. Miss. Code Ann. § 63-3-1313.

Cell Phone and Texting

In 2015, Mississippi enacted a civil prohibition on the use of hand-held devices for texting, emailing and viewing social media posts. Effective July 1, 2015, Mississippi bans drivers from writing, sending or reading a text, email or message, or from accessing a social networking site from their hand-held device. There is an exception for messages regarding an emergency, traffic or weather alert, messages regarding the operation or navigation of the vehicle, or using a hands-free setting. See Miss. Code Ann. § 63-1-73.

The current law does not prohibit use of a phone to talk or to view the internet or any other applications (as long as you avoid navigating to a social networking site, and are not otherwise driving carelessly).

The law does not criminalize this behavior, instead treating it as a civil violation, imposing a $25 fine during its inaugural year, then $100 after that. There is currently a sunset provision for the law in 2018.

Legislation is typically introduced every year seeking to further limit the use of cell phones. Please consult the current status of the law in this area.

Headlights

Miss. Code Ann. § 63-7-11 requires drivers to use headlights from sunset to sunrise, and whenever insufficient light makes it difficult to see others at a distance of 500 feet.

Helmets

Operators and passengers of motorcycles and scooters must wear approved helmets. Miss. Code Ann. § 63-7-64.

Helmet laws for bicycle riders are established by local authorities.

Pedestrian Safety

Pedestrians are subject to all traffic control signals at intersections. Where no traffic signal is in place or operation, the driver of a vehicle shall yield right-of-way to pedestrians within any marked cross-walk or within any unmarked cross-walk at an intersection. (Also, drivers approaching a vehicle yielding to a cross walk may not overtake and pass that vehicle.) Every pedestrian crossing a roadway at any point other than within a marked crosswalk or unmarked crosswalk at an intersection shall yield right of way to all vehicles on the roadway. Miss. Code Ann. §§ 63-3-1101, 1103 and 1105.

Seat Belts

Miss. Code Ann. § 63-2-1 requires all passenger vehicles drivers and front-seat passengers to wear safety belts. Some exemptions include: (1) drivers and passengers with disabilities or medical conditions that make safety belts impossible or dangerous to use; (2) drivers and passengers of vehicles designed for farm use; and (3) on-duty drivers of U.S. Postal Service vehicles and on-duty meter readers. *See also*, Seat Belt Defense.

Unattended Motor Vehicles

Miss. Code Ann. § 63-3-909 outlines what a driver must do before leaving a vehicle unattended in Mississippi: (1) turn off the engine; (2) lock the ignition; (3) remove the key; and (4) set the brake and turn the wheels to the curb (if on a grade).

DUI

The legal limit for a person 21 or older is .08% BAC and .02% BAC for a person under the age of 21. Miss. Code Ann. § 63-11-30.

Contributory negligence rules may apply when passenger fails to exercise reasonable care for his own safety, i.e. riding with an obviously intoxicated driver. *Hill v. Dunaway*, 487 So. 2d 807, 811 (Miss. 1986).

Duty to Defend

The obligation of a liability insurer to defend is determined by the allegations of the complaint or declaration. *Farmland Mut. Ins. Co. v. Scruggs*, 866 So. 2d 714, 719 (Miss. 2004). If the allegations made against the insured bring the action within the coverage of the policy he is entitled to a defense, even though the actual facts later reveal that the claims as presented were not within coverage. *Cullop v. Sphere Drake Ins. Co.*, 129 F. Supp 2d 981, 982 (S.D. Miss. 2001).

An insurer also has a duty to defend where a complaint fails to state a cause of action covered by the policy but the insurer is informed that the true facts are inconsistent with the complaint, or where the insurer learns from an independent investigation that the true facts present the potential liability of the insured. *Farmland*, 866 So. 2d at n.2. (citing *Mavar Shrimp & Oyster Co. v. U.S. Fidelity & Guar. Co.*, 187 So.2d 871, 875 (Miss. 1966).

An insurer has a duty to defend only claims within coverage. An insurer that defends claims under a **reservation of rights** is required to permit the insured to select counsel of his choice, **paid for by the carrier**. *Moeller v. American Guar. And Liability Ins. Co.*, 707 So. 2d 1062, 1069 (Miss. 1996).

Excess Verdicts

See Bad Faith.

Exclusions

Since 2001, Mississippi has required motorists to carry minimum limits of liability insurance. The minimum liability coverages currently required by Mississippi law are 25,000/50,000/ 25,000.

In 2015, Mississippi enacted an amendment to the definition of "proof of financial responsibility" and clarified that liability insurance "may contain exclusions and limitations on coverage as long as the exclusions and limitations language or form has been filed with and approved by the Commissioner of Insurance." Miss. Code Ann. § 63-15-3(j) (as amended 2015). This amendment became effective July 1, 2015.

This amendment was in reaction to the 2014 case of *Lyons v. Direct General Ins. Co. of Mississippi*, 138 So. 3d 887 (Miss. 2014), where the Mississippi Supreme Court held the named driver exclusion invalid to the extent it reduced liability coverage below the minimums required by law.

The enactment of the amendment to § 63-15-3(j) should statutorily abrogate the *Lyons* decision for all policies in effect after July 1, 2015, however, it would still be controlling for policies pre-dating the amendment.

Named Driver Exclusion

The 2015 amendment to the insurance statutes now permits the Named-Driver exclusion for liability policies in effect after July 1, 2015. *See also,* Exclusions.

The "named-driver exclusion" was held invalid by the Mississippi Supreme Court in 2014, except as it applies above the minimum limits (currently 25/50/25). *Lyons v. Direct General Ins. Co. of Mississippi*, 138 So. 3d 887 (Miss. 2014). However, this case has now been abrogated by statute for purposes of policies in effect after July 1, 2015. The prohibition against this exclusion (for the minimum limits) is still valid for policies that pre-date the amendment.

For UM purposes, however, it is not a valid exclusion for the minimum limits. *See also* Uninsured Motorist, Exclusions.

Household Exclusion

The household exclusion was likely affected by the *Lyons* decision referenced above in the Named Driver Exclusion section. *Lyons v. Direct General Ins. Co. of Mississippi*, 138 So. 3d 887 (Miss. 2014). Since the enactment of the amendment to § 63-15-3(j), the case has been abrogated and exclusions and limitations for liability coverage are permitted after July 1, 2015.

The Household Exclusion is not a valid exclusion for UM policies. Accordingly, an injured passenger may recover under a driver's uninsured motorist policy where the household exclusion prevents recovery under liability policy. *Allstate Ins. Co. v. Randall*, 753 F.2d 441 (5th Cir. 1985).

See also Uninsured Motorist, Exclusions.

Family Immunity

Inter-spousal immunity has been abolished in Mississippi. *Burns v. Burns*, 518 So. 2d 1205 (Miss. 1998).

Parent-unemancipated child immunity has been abolished in negligent operation of automobile cases. *Smith v. Holmes*, 921 So. 2d 283, 285 (Miss. 2005). Parents may maintain suits against their children and vice versa. *Ales v. Ales*, 650 So. 2d 482, 487 (Miss. 1995).

Family Purpose Doctrine

The Family Purpose Doctrine by which a family member's negligence is imputed to another while driving an automobile has been expressly rejected in Mississippi. *Prewitt v. Walker*, 97 So. 2d 514, 516 (Miss. 1957); *Smith v. Dauber*, 125 So. 102, 103 (Miss. 1929).

Financial Responsibility Law

The minimum liability coverages required by Mississippi law are 25,000/50,000/25,000.

Mississippi's financial responsibility statute, Miss. Code Ann. §63-15-43, provides, in part, that insurers "[s]hall pay on behalf of the insured named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured, all sums which the insured becomes legally obligated to pay as damages arising out of the ownership, maintenance or use of such motor vehicle . . . ." This statute, however, does not set the minimum coverage requirements for standard automobile policies. Instead, the requirement of minimum limits is found by turning to Miss. Code Ann. § 63-15-4 and §63-15-3(j). In these sections, we find the required minimum limits of 25/50/25.

Since 2001, Mississippi has required motorists to carry minimum limits of liability insurance. Miss. Code Ann. §63-15-4 provides that every motor vehicle operated in this state shall have an insurance card maintained in the vehicle as proof of liability insurance that is in compliance with the liability limits required by §63-15-3(j). Miss. Code Ann. §63-15-3(j) defines "Proof of financial responsibility" as "proof of ability to respond to damages for liability, on account of accidents occurring subsequent to the effective date of said proof, arising out of the ownership, maintenance or use of a motor vehicle, in the amount of" $25,000 per person/$50,000 per accident because of bodily injury or death and $25,000 because of property damage in any one accident."

The insured may elect to obtain UM/UIM limits in at least the minimum provided for by the above statute and up to the limits of liability purchased. All policies are required to contain minimum UM coverage, unless rejected in writing by any named insured. Miss. Code Ann. § 83-11-101, *et seq*.

Frivolous Lawsuits

The court may order a party, his attorney, or both to pay the opposing party's expenses, including attorney's fees, if the court determines a motion or pleading is frivolous or filed in order to harass or delay. Miss. R. Civ. P. 11(b). *See also*, Litigation Accountability Act. Miss. Code Ann. § 11-55-5.

Governmental Immunity

The State of Mississippi and its political subdivisions have waived their tort immunity in certain circumstances for up to $500,000 in damages, or up to the limit of the governmental entities liability insurance if higher, for any single occurrence. Miss. Code Ann. § 11-46-5, 15.

Complete governmental tort immunity is retained for certain claims, including: claims arising from a governmental employee's exercise or failure to exercise a discretionary function or duty; claims arising from an act or omission of a governmental employee engaged in police or fire protection activities unless the employees acted in a reckless disregard for the safety of any person other than those engaged in criminal activity at the time of the injury; claims arising from when the claimant was in prison; and claims arising out of the administration of corporal punishment or actions to maintain control of students unless the teacher acted in bad faith, with a malicious purpose, or in wanton and willful disregard of human rights or safety. Miss. Code Ann. § 11-46-9.

Notice of Claim Against Government

A claimant must give written notice of claim to the chief executive officer of the governmental entity being sued 90 days prior to filing suit. Miss. Code Ann. § 11-46-11. Notice of claim provisions must be strictly complied with. *University of Mississippi Medical Center v. Easterling*, 928 So. 2d 815 (Miss. 2006).

The one-year statute of limitations will be tolled for 95 days against the state or 120 days against a municipality or other political subdivision upon filing the notice of claim. If the governmental entity denies the claim sooner, the statute will once again begin to run. Once the claim is denied or the tolling period has expired, the claimant has an additional 90 days tacked on to the original limitations period in which to file suit. *Page v. University of Southern Mississippi*, 878 So. 2d 1003 (Miss. 2004)

Homeowners' Bill of Rights

In 2009, the Mississippi Insurance Department created a Policyholder Bill of Rights regarding personal lines homeowner insurance. All homeowner policies since 2009 have been required to include the Policyholder Bill of Rights in the issuance and delivery of the policy. The MID identified 19 rights, including the selected excerpts highlighted below:

> 9. Policyholders shall have the right to receive in writing from their insurance company the reason for any cancellation or nonrenewal of coverage. The written statement from the insurance company must provide an adequate explanation for the cancellation or nonrenewal of coverage.
>
> 12. Policyholders shall have the right to receive a written explanation of why a

claim is denied, in whole or in part.

13. Policyholders shall have the right to request and receive from the insurance company any adjuster reports, engineer reports, contractor reports, statements or documents which are not legally privileged documents that the insurance company prepared, had prepared, or used during its adjustment of the policyholder's claim. A company may keep confidential any documents they prepare in conjunction with a fraud investigation.

15. Policyholders shall have the right to prevent an insurance company, agent, adjuster or financial institution from disclosing their personal financial information to companies or entities that are not affiliated with the insurance company or financial institution. Insurance companies must comply with the provisions set out in Mississippi Department of Insurance Regulation 2001-1, "Privacy of Consumer Financial and Health Information Regulation".

17. Policyholders shall have the right to be treated fairly and honestly when making a claim.

Implied Coinsured

There is no restriction on the ability of a landlord's insurer to pursue the tenant for subrogation as a result of damages paid by the insurer which were caused by the tenant. *Paramount Ins. Co. v. Parker*, 112 So. 2d 560 (Miss. 1959).

Indemnity

The obligation to indemnify may result from a contractual relationship, implied contractual relationship, or liability imposed by law. *Hartford Cas. Ins. Co. v. Halliburton Co.*, 826 So. 2d 1206, 1216 (Miss. 2001).

The general rule governing implied indemnity (common law indemnity) for tort liability is that a joint tortfeasor, whose liability is secondary as opposed to primary, or is based upon imputed or passive negligence, as opposed to active negligence, may be entitled, upon an equitable consideration, to shift his responsibility to another joint tortfeasor. *Strickland v. Rossini*, 589 So.2d 1268, 1276 (Miss. 1991).

Insurable Interest

Mississippi follows the general rule that in order to be entitled to proceeds from an insurance policy, the purchaser of the policy must have an insurable interest in the property or life insured. See, e.g., *Southeastern Fidelity Ins. Co. v. Gann*, 340 So.2d 429 (Miss. 1976); *National Life & Accident Ins. Co. v. Ball*, 157 Miss. 163, 127 So. 268 (1930); see also Am.Jur.2d Automobile Insurance § 41 (1980). An insurable interest must exist in an insured when the contract is entered for it to be effective. *Mississippi Farm Bureau Mut. Ins. Co. v. Todd*, 492 So. 2d 919, 931 (Miss. 1986) (citing *Gann*, 340 So. 2d 429 (Miss. 1976)). Obviously, a party who holds legal title has the requisite insurable interest. However, the Mississippi Supreme Court has found an insurable interest in property even though legal title was elsewhere. All that Mississippi requires in order to have an insurable interest is that a person *derive a benefit from the property's existence or would suffer loss from its destruction. Southeastern Fidelity Ins. Co. v. Gann*, 340 So.2d 429 (Miss. 1976).

Insurance Department

Mississippi Insurance Department, 1001 Woolfolk State Office Building, 501 North West Street, Jackson, MS 39201. Phone: 601-359-3569. Web address: http://www.mid.ms.gov.

Interest

There is no "legal rate of interest" in Mississippi for judgments. Miss. Code Ann. § 75-17-7 allows the recovery of both prejudgment and post-judgment interest. If there is a contractual rate of interest, the contract rate will be applied. If not, the judge is given the discretion to determine the appropriate rate of interest.

Miss. Code Ann. § 75-17-7 gives courts the discretion to award simple or compound interest. *In re Guardianship of Duckett*, 991 So. 2d 1165, 1182 (Miss. 2008). The Mississippi Supreme Court has held that awarding post-judgment interest at the rate of one percent above the prime rate was within the chancellor's discretion in tort suit against as underinsured motorist carrier. *U.S. Fidelity & Guar. Co. v. Estate of Francis ex rel. Francis*, 825 So. 2d 38, 50 (Miss. 2002).

Subject to certain exceptions, the legal rate for "notes, accounts and contracts" is 8% per annum, calculated according to the actuarial method. Miss. Code Ann. § 75-17-1. *See also* § 87-7-3 (1% per month on unpaid construction contracts).

Prejudgment interest is only available if damages are fixed and liquidated. *Falkner v. Stubbs*, No. 2010 CT 01664 (Miss. August 22, 2013). Prejudgment interest must be pleaded in the complaint.

Life Insurance

Proceeds of a life insurance policy become due on the date of the death of the insured. Interest shall be computed from the insured's death until the date of payment and shall be computed at the rate of interest guaranteed by the policy or at the current rate of interest applicable to death benefits. Miss. Code Ann. § 83-7-6.

Intoxication Level

The legal limit for a person 21 or older is .08 percent BAC and .02 percent BAC for a person under the age of 21. Miss. Code Ann. § 63-11-30. *See also* DUI.

Joint and Several Liability

Since 2004, simple negligence actions apply only several liability. A party is only responsible for his share/percentage of apportioned fault.

Joint and several liability only exists in Mississippi when individuals knowingly pursue a common plan or design to commit a tortious act. Fellow defendants acting in concert have a right of contribution between one another. Miss. Code Ann. § 85-5-7.

All participants to the occurrence, including any absent tortfeasors, must be considered in the apportionment of fault. *Estate of Hunter v. General Motors* Corp, 729 So. 2d 1264, 1272-73 (Miss. 1999). *See also* Contribution.

Judgment Causing License Suspension

Upon the request of a plaintiff or his attorney in a case involving an automobile collision, a losing defendant's license will be suspended if a judgment is not paid within 60 days and the plaintiff's attorney requests that it be suspended. Miss. Code Ann. § 63-15-25 through 63-15-35. The statutes permit the lifting of the suspension for agreed upon installment payments. The statutes only require the satisfaction of a judgment up to the minimum insurance limits required by law.

Liquor Liability

Mississippi has a statute which provides immunity from liability of those who lawfully sell or supply intoxicating beverages by permit. However, this liability limitation does not extend to the holder of an alcoholic beverage permit, his agent, or employee who sells to a visibly intoxicated person. Miss. Code Ann. § 67-3-73.

Social hosts are also immune from liability for serving or furnishing alcoholic beverages to persons who may lawfully consume such beverages. Further a social host is not liable for those

that consume alcohol on his premises and in his absence. These immunities do not apply if alcohol consumption is forced by the host or he falsely represents that the beverage contains no alcohol. Miss. Code Ann. § 67-3-73.

Liens

Medicaid

Medicaid has a statutory right of recovery from the beneficiary and from third persons or entities that a beneficiary has a right to sue. Miss. Code Ann. § 43-13-125(1) and § 43-13-305. Effective 2014, the Mississippi Division of Medicaid has contracted with Health Management Systems, Inc. (HMS) to be the primary contact for all casualty recovery inquiries. Contact information: HMS Mississippi Casualty Recovery, P.O. Box 1350, Jackson, MS 39201-9820; 855-547-4984; missubro@hms.com.

Medicare

Medicare is controlled by federal law. *See* 42 U.S.C. § 1395y(b). Medicare claims to have a superior right of reimbursement, which may be helpful to think of as a "super lien." This means that Medicare is not required to notify anyone of its right to reimbursement, nor is it required to make a request for reimbursement in order to enforce its right to recovery. Instead, the parties to a liability claim must notify Medicare of the claim, take action to determine the amount of the reimbursement and make payment accordingly. This includes reimbursement for past treatment as well as protection of Medicare's interests when future treatment will be necessary.

Hospital

Mississippi law allows only for a transfer of benefits for medical costs by assignment. Unlike some other states, Mississippi has no statutory provision for a "hospital's lien," "physician's lien" or anything synonymous, nor does there appear to be any case law creating a medical provider's equitable lien on insurance benefits because of medical services rendered. *Memorial Hospital at Gulfport v. Guardianship of Proulx*, No. 2012-CA-01714-SCT (Miss. September 12, 2013). *See also* Assignments.

Made Whole Rule

The "made whole rule" is a general principle that an insurer is not entitled to equitable subrogation until the insured has been fully compensated. *Hare v. State*, 733 So. 2d 277 (Miss. 1999); *United Services Auto. Ass'n v. Stewart,* 919 So. 2d 24 (Miss. 2005). This equitable right to be made whole cannot be superseded by contrary contract language. 5 MS Prac. Encyclopedia MS Law § 40:97. So far, this rule applies only to insurance carriers and not to actual healthcare providers. *Memorial Hospital at Gulfport v. Guardianship of Proulx*, No. 2012-CA-01714-SCT (Miss. September 12, 2013).

Mandatory Minimum Limits

See Financial Responsibility Law

Medical Records Costs

Mississippi limits the amount a medical provider can charge a patient or her representative for providing paper copies of medical records. Miss. Code Ann. § 11-1-52 provides for a charge of no more than $20.00 for pages 1 through 20, $1.00 per page for the next 80 pages, and $0.50 per page for all pages thereafter. A provider may also charge 10% for postage and handling and $15 for recovering the records from an off-site location.

The medical ethics rules (applicable to all physicians licensed in Mississippi) similarly limits the costs for providing paper copies of medical records to the patient, his legal representative, or other person holding a written authorization. The "ethics rules" give a little extra punch to this situation as they say that any refusal to release records "as enumerated above" is "unprofessional conduct, dishonorable or unethical conduct likely to deceive, defraud or harm the public . . ."

Under Federal law, a patient has the "right to obtain from [their health care providers] a copy of [their medical records] in an electronic format," 42 USC §17935(e)(1), and that health care provider is allowed to bill "only the cost of … [c]opying, including the cost of supplies for and labor of copying," 45 CFR 164.524(c)(4)(i). *See* Health Information Technology for Economic and Clinical Health Act (HITECH Act).

If an electronic copy of the records is requested, the medical provider should not charge the cost for creating paper copies.

If an insurance company requests these records, and specifically points out that only an electronic copy was requested and that the charges for paper copies are illegal, the medical provider often tries to claim that the HITECH Act's medical records billing limits apply only to requests *directly from the patient that are going straight to the patient*, and so they don't apply to other, even though it is at the patient's request. This contention can be refuted as the Department of Health and Human Services made clear, "The final rule adopts the proposed amendment Sec. 164.524(c)(3) to expressly provide that, if requested by an individual, a covered entity must transmit the copy of protected health information directly to another person designated by the individual." Federal Register January 25, 2013 Vol 78 No. 17, Page 5634.

Marriage

Common Law

Mississippi does not recognize common law marriages entered into after April 5, 1956. Miss. Code Ann. § 93-1-15. However, a common law marriage validly entered into in a state that recognizes common law marriage will be recognized in Mississippi. *George v. George*, 389 So. 2d 1389 (Miss. 1980).

Minors

The age of majority in Mississippi is 21. Miss. Code Ann. § 1-3-27.

However, all persons 18 or older are deemed to be adults for purposes of *personal property*. Therefore, anyone 18 or older, if not otherwise disabled, has the capacity to enter into binding contractual relationships affecting such *personal property,* including the right to settle a claim, and accept money in the settlement of a claim. Miss. Code Ann. § 93-19-13. *Garret v. Gay*, 394 So. 2d 321, 323 (Miss. 1981).

A minor age 15 or older may contract for life, health and accident insurance. Miss. Code Ann. § 83-7-19.

Negligence

Mississippi applies the common law "rule of sevens." A child under the age of seven is irrefutably presumed to be incapable of negligence. Children between the ages of 7 and 14 are presumed to be incapable of negligence, but the presumption may be rebutted by showing that the child had elevated capacity. Children above the age of 14 are presumed to be capable of negligence. *Steele v. Holiday Inn*, 626 So. 2d 593 (Miss. 1993).

Minors' Settlements

The father and mother are the joint natural guardians of their minor children and are equally charged with their care, nurture, welfare and education, and the care and management of their estates. Miss. Code Ann. § 93-13-1. Because of this, when settling a minor's claim, both parents must petition the Court for authority to settle or one must be a petitioner and the other parent join in the petition for all relief requested. As the natural parents and guardians of their children, the mother and father can accept settlements of $25,000.00 or less before the Court without being appointed as guardian. Miss. Code Ann. § 93-13-211. When a total settlement is greater than $25,000.00, or personal property exceeding the value of that sum, a guardian is required to be appointed to accept the settlement.

A minor under guardianship is a ward of the Chancery Court. *Carpenter v. Berry*, 58 So. 3d 1158 (Miss. 2011). As such, it must take all necessary steps to conserve and protect the best interest of these wards of the court. *Id.* And all persons who deal with guardians or with the courts in respect to the rights of minors are charged with this knowledge. *Id. See also Union Chevrolet Co. v. Arrington*, 138 So. 593 (Miss. 1932).

It is incumbent upon a defendant, in an action seeking to settle a claim of a minor under guardianship, to assure that all of the procedures set out by the Supreme Court are followed or risk a set-aside of the settlement. *Carpenter v. Berry*, 58 So. 3d 1158 (Miss. 2011).

Every petition for authority to compromise and settle a minor's claim shall set forth the facts in relation thereto and the reason for such compromise and settlement and the amount thereof. *See* Unif. Chanc. Ct. R. 6.10. According to the Uniform Rule, the material witnesses concerning the injury and damages shall also be produced before the Chancellor for examination. *Id.* Where counsel representing the minor has investigated the matter and advised settlement, he or she shall give testimony to the Court regarding the result of the investigation. *Id.*

It is incumbent upon those paying money to a guardian to make certain that the chancellor's decree is faithfully executed in every respect. *Joyce v. Brown*, 304 So. 2d 634 (Miss. 1974).

In practice, we have found that an increasing number of chancellors are requiring that the minor be represented by an attorney at the settlement hearing.

Parental Liability for Medical Expenses

Mississippi law requires parents to pay for their child's reasonable medical expenses. This is a legal duty of both the father and the mother. The minor child is not legally responsible for these expenses. *McLain v. West Side Bone and Joint Center*, 656 So. 2d 119 (Miss. 1995); *Lane v. Webb*, 220 So. 2d 281 (Miss. 1969); *Alexander v. Alexander,* 494 So. 2d 365 (Miss. 1986). *Haver v. Hinson*, 385 So. 2d 605 (Miss. 1980). Accordingly, the medical, surgical, hospital and nursing expenses incurred by curing or relieving a minor child's injuries are recoverable, if at all, by his parent, and not by him (unless he is emancipated). These are separate claims owned by the parents of the minor. However, if the parents bring suit on behalf of the minor "as next friend" (as provided for under the rules), the courts have held that parents waives their separate claim for such damages in favor of the child and permits all damages to be included in one case. *Lane v. Webb*, 220 So. 2d 281 (Miss. 1969). Double recovery for such expenses is not allowed. *Cook v. Children's Medical Group, P.A.*, 756 So. 2d 734 (Miss. 1999).

Misrepresentation

An insurer may cancel or void a policy from its inception and treat as if it never existed upon proof that the misrepresentation of a material fact is in the application. *Casualty Reciprocal Exchange v. Wooley*, 217 So. 2d 632, 635-36 (Miss. 1969).

Warranty v. Representations

A distinction is made as to whether the misrepresentations are warranties or representations. *Sanford v. Federated Guaranty Ins. Co.*, 522 So. 2d 214, 216-18 (Miss. 1988).

The insurer only has to show that the information is literally not true in the case of a warranty because the materiality of the statement will be presumed. *Colonial Life & Acc. Ins. Co. v. Cook*, 374 So. 2d 1288, 1291 (Miss. 1979).

In the case of representations, the insurer must show that the information is not substantially true and was a material to the risk assumed by the insurer. *National Cas. Co. v. Johnson*, 67 So. 2d 865, 867 (Miss. 1953). Materiality is determined by the probable and reasonable effect which truthful answers would have on the insurer. *Sanford*, 522 So. 2d at 217. If the information helps determine whether or not to accept the risk then it is material. *Wooley*, 217 So. 2d at 635-36. Intent does not determine misrepresentation, and a policy may be voided even if there is an innocent and good faith belief the statements are true. *Fidelity Mut. Life Ins. Co. v. Miazza*, 46 So. 817, 819 (Miss. 1908).

The terms of the application control whether a question is a warranty or a representation. The terms must clearly indicate that the terms will be treated as warranties, and any ambiguity will favor treating the statements as representations. *Sanford*, 522 So. 2d at 216-17.

Negligence

Children

Mississippi applies the common law "rule of sevens." A child under the age of seven is irrefutably deemed to be incapable of negligence. Children between the ages of 7 and 14 are presumed to be incapable of negligence, but the presumption may be rebutted by showing that the child had elevated capacity. Children above the age of 14 are presumed to be capable of negligence. *Steele v. Holiday Inn*, 626 So. 2d 593 (Miss. 1993).

Statutory Standards of Care

Negligence per se, or a presumption of negligence, is the general rule in Mississippi if the plaintiff was in the class that the statute was designed to protect and the harm was of the type that the statute was designed to prevent. *See Byrd v. McGill*, 478 So. 2d 302 (Miss. 1985).

Notice of Insurance Claim

The duty to defend presupposes the duty to notify the insurer of any proceedings instituted against them. Without notice the insurer cannot be expected to provide a defense. *Mimmitt v. Allstate County Mut. Ins. Co., Inc.*, 928 So. 2d 203, 207 (Miss. App. 2006).

Owner's Liability

Without some special relationship, an owner of an automobile, merely by virtue of his ownership interest, is not liable for injuries negligently caused by a permissive driver. *Wood v. Nichols*, 416 So. 2d 659 (Miss. 1982). *See also*, Vicarious Liability.

Parental Liability

Parents may be found liable for property damage up to $5,000 caused by the willful or malicious acts of their minor children between age 10 and 18. Miss. Code Ann. § 93-13-2.

Parents have a duty to take reasonable measures to supervise their children in order to protect others from acts of their children which are reasonably foreseeable. *Williamson v. Daniel*, 748 So. 2d 754, 759 (Miss. 1999).

There is joint and severally liability for the willful or negligent acts of a minor under 17 while operating motor vehicle between minor and person who signed application for license or permit. M.C.A. § 63-1-25.

Premises Liability

Generally

The duty which a landowner owes to another is determined by the common law statuses: trespasser, invitee, and licensee. *Little v Bell*, 719 So.2d 757 (Miss. 1998). A three-step process is applied to determine premises liability: determining the status of the injured person; the duty that is owed based on the status; and whether the duty was breached by the landowner. *Leffler v. Sharp*, 891 So. 2d 152 (Miss. 2004).

Trespasser

A trespasser is someone who enters the property of another without permission. *Hughes v. Star Homes, Inc.*, 379 So. 2d 301, 303 (Miss 1980). A landowner owes the trespasser the duty not to willfully or wantonly injure him. *Id.* at 304.

The Attractive Nuisance Doctrine applies to situations involving child trespassers. The plaintiff must prove four elements when a child enters another's property and is injured by a dangerous condition: 1) that the owner knew or should have known of the dangerous artificial condition, 2) that the owner knew or should have known that children frequent the area where the dangerous condition exists, 3) that it is unlikely that the child trespasser could appreciate the risk presented, and 4) that the cost to correct the dangerous condition is minimal compared to the magnitude of the risk. It should be noted that the plaintiff is NOT required to show that the child was actually attracted by the dangerous condition. *Keith v. Peterson*, 922 So. 2d 4 (Miss. Ct. App. 2005), cert. denied, 926 So. 2d 922 (Miss. 2006).

Licensee

A licensee is someone who enters the property of another for his own benefit with the express or implied permission of the owner. *Little*, 719 So. 2d at 760. A landowner owes a licensee the duty to refrain from willfully or wantonly injuring him (same as Trespasser). *Hughes*, 379 So. 2d at 304. "Social guests" are considered licensees.

Invitee

An invitee is someone who enters the property of another with the express or implied permission of the owner for the mutual benefit of the invitee and the owner. *Hoffman v. Planters Gin Co. Inc.*, 358 So. 2d 1008, 1011 (Miss. 1978). The duties that the landowner owes to an invitee are to keep the premises reasonably safe and to warn of hidden dangers. *Mayfield v. The Hairbender*, 903 So. 2d 733 (Miss. 2005).

***Hoffman* Exception**

The premises owner is liable for injuries proximately caused by his affirmative or active negligence which subjects a person to unusual danger, or increases hazard to him, when his presence is known to the owner. The standard is of ordinary and reasonable care in these situations. *Hoffman v. Planters Gin Co., Inc.*, 358 So. 2d 1008, 1013 (Miss. 1978).

Slip and Fall

In order for a plaintiff to recover in a slip and fall case, he must show (1) that some negligent act of the defendant caused his injury; or (2) that the defendant had actual knowledge of a dangerous condition and failed to warn the plaintiff; or (3) that the dangerous condition existed for a

sufficient amount of time to impute constructive knowledge to the defendant, in that the defendant should have known the dangerous condition. *Anderson v. B. H. Acquisitions, Inc.*, 771 So. 2d 914, 918 (Miss. 2000) (citing *Downs v. Choo*, 656 So. 2d 84, 86 (Miss. 1995)).

Primary/Excess Issues

There is no statute in Mississippi governing "other insurance" provisions, other than a provision which states that "any motor vehicle liability policy may provide for the prorating of the insurance thereunder with other valid and collectible insurance." *See* Miss. Code Ann. 63-15-43(9). There is no case law that has invalidated "excess" policy provisions as contrary to public policy or based on the statute mentioned.

Nevertheless, there are some situations that will arise that will create a conflict between a carrier's attempt at designating its policy as excess, and the "other" insurance company's attempts to do the same thing. Under Mississippi case law, when two (or more) policies present competing other insurance clauses (such that, if both literally read, would leave no primary coverage), the courts will disregard both provisions, and *deem the policy for the accident vehicle as the primary. Travelers Indemnity Company v. Chappell*, 246 So. 2d 498 (Miss.1971); *USF&G v. John Deere Insurance Co.*, 830 So. 2d 1145 (Miss. 2002).

In other words, when two "other insurance" clauses conflict such that neither insurer purports to carry the primary policy of coverage, the two "other insurance" clauses cancel each other out. This common law invention is known as "The Rule of Repugnancy." Once the rule is applied, "the policy of the owner of the vehicle involved in the accident is ordinarily considered to be the 'primary policy.'" *Chappell,* at 505.

Where there are two conflicting "other insurance" clauses, a carrier still should examine the language of the policies to see if in fact they conflict. As it stands right now, however, this basic rule of contract construction comes with a caveat in Mississippi, for even where the policies do not conflict, the appellate courts have shown a tendency to apply the "primary" rule anyway. As a result, it is becoming more and more "universal" (as one Mississippi opinion put it) to make the "primary" insurer the one with coverage of the automobile involved, conceivably in the face of policy language to the contrary. Recently, the Mississippi Supreme Court summarily held "[t]he long-standing law in Mississippi is that the insurance policy issued to the owner of the vehicle is the primary policy . . . ." *See Guidant Mut. Ins. Co. v. Indemnity Ins. Co. of North America*, 13 So. 3d 1270 (Miss. 2009). That "primary" insurer will be required to exhaust the limits of the policy before the other, excess policy will be invoked. Assuming a court can be reminded to look at the policy language first, in a case in which the other policy announces itself to be the primary policy *or* provides that coverage is to be pro rated between the insurers, the company's excess provision would not be in conflict, and would in fact be excess.

A similar issue arises when insurance carriers dispute which company will be able to take the offset of other available insurance (such as the tortfeasor's liability policy). The only Mississippi

case to have addressed the question of priority of a set-off is *Dixie Insurance Company v. State Farm Mut. Auto. Ins. Co.*, 614 So.2d 918 (Miss. 1992). In *Dixie*, the court appeared to create the rule that the primary carrier is entitled to the offset. The court stated, "[t]he trial court correctly held that the primary insurer was entitled to offset first." *Id. See also Strickland v. Hill*, 2002 WL 31654961(E.D. La.) (unpublished opinion) (noting that the offset doctrine "appears to be tailored based on the ranking of insurance companies"). However, this "rule" may be an overstatement of Mississippi law as the court strayed from policy interpretation in this decision and the announcement of this rule was unnecessary.

Reasonable Expectation Doctrine

Mississippi has adopted the reasonable expectations doctrine on public policy grounds: "The objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though the painstaking study of the policy provisions would have negated those expectations." *Brown v. Blue Cross & Blue Shield*, 427 So. 2d 139, 141, fn. 2 (Miss. 1983) (citing Keeton, Insurance Law Rights at Variance with Policy Provisions, 83 Harv. L. Rev. 961, 967 (1970)).

Releases

In order to obtain a valid and binding release, certain situations call for court or other government agency approval:

1) Minors (under 18) – need Chancery Court approval
2) Incompetent Adults – need Chancery Court approval
3) Estates/Wrongful Death Claims – need Chancery or Circuit Court approval
   -optional method for Estates less than $50,000 via affidavit by heir (§ 91-7-322)
4) Workers Compensation claimants – need Circuit Court or Workers Comp Commission approval for liability payments, however, UM payments are exempt.

Repair Shop

Insurer cannot condition the payment of a claim on the requirement that repairs be made by a particular repair shop. In other words, the claimant or insured has the right to select the repair shop of his or her choice. However, the insurer is only required to pay the lowest possible amount for which the repair could properly and fairly be made within a reasonable geographic area. Miss. Code Ann. § 83-11-501.

Draft/Check

When there is not a total loss, the insurer must add the name of the repair shop or any lien holders as a payee on a check. In the case of a total loss, the insurer must add the name of any lien holder to the insured as payee on the check. Miss. Code Ann. § 83-11-551 (currently scheduled to be repealed July 1, 2017).

Salvage Title Law

Salvage titling is governed by Title 35, Part 7 of the Mississippi Administrative Code. *See also* § 83-11-551 (alternative procedure to obtain salvage tile or parts-only certificate).

Seat Belt Defense

Evidence that a plaintiff failed to use a seatbelt may not be used to prove contributory negligence. Miss. Code Ann. § 63-2-3.

However, there are other instances in which the non-usage may be relevant. For example, the defendant may properly introduce evidence as to whether the plaintiff was using a seatbelt at the time of the accident in order to establish facts concerning the causation, nature, and extent of injury. In these situations the judge will consider whether: the evidence of the non-usage has probative value other than proving negligence of the plaintiff; whether the prejudicial effect substantially outweighs the probative value; and whether other evidentiary rules permit the introduction of the evidence. *Estate of Hunter v. General Motors Corp.*, 729 So. 2d 1264, 1269 (Miss. 1999).

See also, Driver Safety Laws.

Spoliation of Evidence

Spoliation of evidence is not an independent cause of action in Mississippi. *Richardson v. Sara Lee Corp.*, 847 So. 2d 821, 824 (Miss. 2003).

Mississippi case law holds that the destruction of evidence results in a negative presumption or inference against the party who destroys the evidence. *Thomas v. Isle of Capri Casino*, 781 So.2d 125, 133-34 (Miss. 2001). The Mississippi Supreme Court has held that where a (medical) record required by law to be kept is *unavailable due to negligence*, an inference arises that the record contained information unfavorable to the defendant, and the jury should be so instructed. *Delaughter v. Lawrence County Hosp.*, 601 So.2d 818, 822 (Miss. 1992). *See also*, *Estate of Perry ex rel. Rayburn v. Mariner Health Care, Inc.*, 927 So.2d 762 (Miss.Ct.App. 2006).

Statutes of Limitation

Negligence

Most negligence actions are governed by a 3 year statutes of limitations which runs from date of accident/injury. Miss. Code Ann. § 15-1-49.

The statute provides for a "discovery rule" but only for *latent* injuries and diseases. If a person has such a latent injury or disease, then the statute does not start to run until the person discovers, or by reasonable diligence, should have discovered, the injury. Miss. Code Ann. § 15-1-49 (2).

UM context

A cause of action against an insurer for uninsured-motorist benefits is subject to a 3 year statute of limitations. Miss. Code Ann. § 15-1-49. The limitations period, however, does not always start at the date of the accident or injury. Instead, it commences when the insured knew or should have known that the tortfeasor was uninsured or underinsured. *Montgomery v. Safeco Ins. Co. of Ill.*, No. 2011-CA-00225-COA (Miss. App. March 20, 2012). The statute begins to run when it can be reasonably known that the damages suffered exceed the limits of insurance available to the alleged tortfeasor. *Jackson v. State Farm Mut. Auto. Ins. Co.*, 880 So. 2d 336 (Miss. 2004).

Receipt by an injured insured of an accident report reflecting that the alleged tortfeasor possesses no insurance provides reasonable knowledge that damages suffered exceed the limits of insurance available for purposes of running the statute of limitations. *Montgomery v. Safeco Ins. Co. of Ill.*, No. 2011-CA-00225-COA (Miss. App. March 20, 2012).

Tolling/Agreement

The Mississippi Supreme Court recently ruled that statute of limitations cannot be lengthened by agreement. This prohibition against tolling agreements applies to any statute of limitations in Chapter 15, but not to limitations in other chapters of the code. However, the courts will look to determine whether a party is equitably estopped from asserting the statute of limitations under the circumstances. Miss. Code Ann. § 15-1-5. *Townes v. Rusty Ellis Bulider, Inc.,* No. 2011-CA-164-SCT (Miss. October 4, 2012).

Continued promises of payment can create a situation where the court will find that a carrier waived the statute. *See Douglas v. Parker Elec. v. Mississippi Design and Devel. Corp.*, 949 So.2d 874 (Miss. 2007). However, simply continuing to negotiate has been held insufficient to toll or waive statute.

Intentional Torts

Many intentional torts, including intentional infliction of emotional distress, are governed by a 1-year statute of limitations. Miss. Code Ann. § 15-1-35.

Malpractice

Medical malpractice actions have a 2 year statute of limitations which runs from when the alleged action or omissions occurred, or when with reasonable diligence might have been first discovered. Notice must be given 60 days prior to filing of the suit which will extend the statute of limitations if it would have expired during the 60 days. Miss. Code Ann. § 15-1-36.

There is a seven year statute of repose which bars any action not brought within that time period unless it involves a foreign object or fraudulent concealment. *Id.*

Minors

Statute does not start running on minors until they turn 21 (even if they are emancipated), then it starts to run for the applicable statute of limitations for that injury. Miss. Code Ann. § 15-1-59.

Wrongful Death

Statute runs from underlying event that caused injury. The statute applicable to the particular injury controls (i.e. medical malpractice claims have 2 years from injury, intentional torts have 1 year from injury, general negligence claims have 3 years from injury). This is a change in the law since 2006. *See Jenkins v. Pensacola Health Trust, Inc.*, 933 So. 2d 923 (Miss. 2006) (previous law applied a 3-year statute from the date of death).

The wrongful death statute, Miss. Code Ann. 11-7-13, encompasses both survival claims and wrongful death claims. The Mississippi Supreme Court has recently clarified the confusion in this area and held that the statute begins to run from the underlying tort that caused the death in a survival claim; however, the statute begins to run from the time of death in a wrongful death claim. *Caves v. Yarbrough, M.D.*, 991 So. 2d 142, 149-50 (Miss. 2008).

Survival claims are claims in which if death had not ensued, the injured party could have maintained an action and recovered damages. A true wrongful death claim belongs solely to the decedent's beneficiaries and is a claim brought to recover damages one person's death causes to another (i.e. loss of love, society and companionship). *Id.* at 149. *See also*, Wrongful Death.

Subrogation

Mississippi has adopted the "made whole" rule in that the insurer is not entitled to subrogation until the insured has been completely compensated. The made whole rule cannot be overridden by contractual language. *Hare v. State*, 733 So. 2d 277, 284 (Miss. 1999).

The UM Act provides the right of subrogation to the UM carrier against the tortfeasor to the extent any UM benefits have been paid to the insured as a result of the tortfeasor's negligence. Miss. Code Ann. § 83-11-107. The insurer also has the right to receive notice in the event the named insured institutes action against the tortfeasor. Miss. Code Ann. § 83-11-105. As noted above, the UM carrier's right to subrogation is secondary to the insured's right to receive a full recovery. *Dunham v. State Farm Mut. Auto. Ins. Co.*, 366 So. 2d 668, 672 (Miss. 1979). The "made whole" rule has been held NOT to apply to UM carrier's right to offset liability limits of the tortfeasor.

UM carriers may be precluded from a subsequent subrogation suit against the tortfeasor when the insured executes a release of the tortfeasor in consummation of a settlement with or without the UM carrier's knowledge or consent. *St. Paul Property and Liability Ins. Co. v. Nance*, 577 So. 2d 1238, 1241 (Miss. 1991). Releasing the tortfeasor without the carrier's consent usually triggers an exclusion of coverage in standard policies.

Title of Vehicle

Mississippi is a "title" state. By statute, Mississippi does not regard the sale of a motor vehicle as consummated until the certificate of title is properly transferred and delivered to the purchaser. Until this occurs, the seller is regarded as in possession of legal title to the vehicle. In this regard, Mississippi Code Annotated § 63-21-31 states in pertinent part:

(1) If an owner transfers his interest in a vehicle, ... other than by the creation of a security interest, he shall, at the time of the delivery of the vehicle, ... execute an assignment and warranty of title to the transferee in the space provided therefor on the certificate or as the State Tax Commission prescribes, and cause the certificate and assignment to be mailed or delivered to the transferee.

(5) ... a transfer by an owner is not effective until the provisions of this section have been complied with.

See also *Hicks v. Thomas*, 516 So.2d 1344, 1346 (Miss.1987) (this statute "accepts certainty of title as our primary value, and provides a simple method for transferring title to motor vehicles-endorsement and delivery to the transferee of the title certificate").

Owner Liability

Without some special relationship, an owner of an automobile, merely by virtue of his ownership interest, is not liable for injuries negligently caused by a permissive driver. *Wood v. Nichols*, 416 So. 2d 659 (Miss. 1982). See also Vicarious Liability.

Towing

A towing company may recover from the insurer if the insurer takes title of the vehicle and doesn't pay fees. An insurer may not assume or accede to title without assuming the credit obligations for towing and storage as well. Once an insurer has succeeded to title they may not abandon the vehicle without consent of the towing or storage service. Miss. Code Ann. § 83-11-301.

Unfair Claims Settlement Practices

Mississippi has not adopted the Model Unfair Claims Settlement Practices Act, but has analyzed the conformity of the Mississippi statute on mandatory policy provisions, Miss. Code Ann. § 83-9-5, with the Model Act. *Lewis v. Equity Nat. Life Ins. Co.*, 637 So. 2d 183, 188 (Miss. 1994).

Uninsured/Underinsured Motorist

UM Statute

Mississippi mandates uninsured motorists (UM) coverage be provided in every policy of automobile insurance issued in the state, unless rejected in writing. Miss. Code Ann. § 83-11-101.

Mississippi law does not treat UM claims separately from underinsured motorist (UIM) claims. The statute merely defines an uninsured motorist to include the underinsured motorist.

Mississippi's UM statute, incorporated into every policy, does not speak to accidents or negligence, but only provides that it covers "all sums which the insured is entitled to recover as damages . . . ." Miss. Code Ann. § 83-11-101. The Automobile Insurance Law and Practice treatise states that the purpose is to protect innocent insureds that are injured "as a result of the negligence of" financially irresponsible drivers. *See also, Harthcock v. State Farm Mut. Auto. Ins. Co.*, 248 So. 2d 456 (Miss. 1971). While the UM statute does not clearly describe what constitutes an insured event, UM endorsements commonly contain a coverage provision which requires that the insured's injuries or damages be caused by an "accident."

Further, UM coverage must arise out of the "ownership, maintenance or use" of an uninsured vehicle. *Spradlin v. State Farm Mut. Auto. Ins. Co.*, 650 So. 2d 1383 (Miss. 1995).

The UM statute does not mandate coverage for punitive damages that might be assessed against an uninsured motorist. *State Farm Mut. Auto. Ins. Co. v. Daughdrill*, 474 So. 2d 1048 (Miss. 1985). Policy language excluding punitive damages is permitted. However, if not excluded, it is covered.

Caveat: The statute does not prevent an insurer from providing greater coverage than required by the statutes. Thus, it is very important to always review both the statute and the policy. The UM statute is only the floor for coverage and the policy may grant additional benefits.

Uninsured Motor Vehicle Definition

Miss Code Ann. § 83-11-103 defines an "uninsured motor vehicle" to mean:

(1) a motor vehicle as to which there is no bodily injury liability insurance; or

(2) a motor vehicle with liability insurance, but the insurance company has legally denied coverage or is unable, because of being insolvent at the time of or becoming insolvent during the 12 months following the accident, to make payment with respect to the legal liability of its insured; or

(3) an insured motor vehicle, when the liability insurer of such vehicle has provided limits of bodily injury liability for its insured which are less than the limits applicable to the injured person provided under his uninsured motorist coverage; or

(4) a motor vehicle as to which there is no bond or deposit of cash or securities in lieu of such bodily injury and property damage liability insurance or other compliance with the state financial responsibility law, or where there is such bond or deposit of cash or securities, but such bond or deposit is less than the legal liability of the injuring party; or

(5) a motor vehicle of which the owner or operator is unknown; provided that in order for the insured to recover under the endorsement where the owner or operator of any motor vehicle which causes bodily injury to the insured is unknown, actual physical contact must have occurred between the motor vehicle owned or operated by such unknown person and the person or property of the insured; or

(6) a motor vehicle owned or operated by a person protected by immunity under the Mississippi Tort Claims Act, if the insured has exhausted all administrative remedies.
No vehicle owned by the United States government and against which a claim may be made under the Federal Tort Claims Act, is considered uninsured.

Bodily Injury Definition

Miss. Code Ann. § 83-11-102 defines "bodily injury" simply by saying that it includes death resulting from such injury. This term has received little attention for the Mississippi Supreme Court. *See* Miss. Ins. Law and Prac. § 16:28 (citing *E.E.O.C. v. Southern Pub. Co., Inc.*, 894 F.2d 785 (5th Cir. 1990) (noting the Mississippi Supreme Court has not defined bodily injury)).

Evaluating UIM Coverage (triggering the UIM claim)

In determining whether a tortfeasor is properly considered to be an underinsured motorist with regard to a particular insured, the limits of the tortfeasor's liability should be compared to the stacked total of UM benefits applicable to the insured. In short, compare the liability limits to the stacked UM limits. *Cossitt v. Federated Guar. Mut. Ins. Co.*, 541 So. 2d 436 (Miss. 1989). It does not matter that a particular insured does not recover the full liability limits to determine coverage for UM. The statute only requires comparing limits to limits. For a UM claim to be valid, for policies following the Mississippi statute, the UM limits (stacked) must exceed the liability limits. If they are equal or less than then liability limits, there is no UM claim. Again, the fact that an insured may not actually receive the limits does not matter. It is a limits to limits only analysis. If a UM claim is triggered via the limits-to-limits analysis, you then determine how much UM is available under other rules, discussed below. Miss. Code Ann. § 83-11-101 *et seq.*

Offsets and Exhaustion

Different from determining if UM coverage exits, the UM carrier has the right to offset liability coverage payments. If provided for in its policy, the UM insured's carrier may only validly offset the amount of UM benefits available to the insured by the amount of liability benefits "actually received" by the UM insured. In this context, "actually received" has been defined as those amounts that are either tendered by the tortfeasor's liability carrier or otherwise available to the UM insured. *Fidelity & Guaranty Underwriters, Inc. v. Earnest*, 585, 591-92 (Miss.1997). Therefore, if multiple claimants are involved and an insured does not receive the full limits available to him, the carrier can only offset those amounts received or that he could have actually received.

Exhaustion: An insured has the right to elect to pursue a claim directly against his UM carrier and forego the right to seek damages against the tortfeasor (and liability carrier). In such situations, the UM carrier does not have an offset, and must advance the total UM limits (if otherwise appropriate) and force the UM carrier to seek subrogation from the tortfeasor. In other words, it has been held that a UM insured is not required to exhaust the limits of the tortfeasor's liability before he can collect against his UM carrier. *Harthcock v. State Farm Mut. Auto. Ins. Co.*, 248 So. 2d 456, 461-62 (Miss. 1971). *But see Robinette v. American Liberty Ins. Co.*, 720 F. Supp. 577 (S.D. Miss. 1989).

Priority: "Primary First" - It has been noted that the primary insurer has the right to offset its UM limits first. *Dixie Ins. Co. v. State Farm Auto. Ins. Co.*, 614 So. 2d 918 (Miss. 1992). Check policy language to determine applicability. *See* Primary/Excess Issues.

An insurer may not offset MedPay payments to the insured against UM coverage limits. *Prudential Prop. & Cas. Ins. Co. v. Mohrman*, 828 F. Supp 432, 438 (S.D. Miss. 1993).

An insurer may not offset Workers Compensation payments to the insured against UM coverage limits. *Nationwide Mut. Ins. Co. v. Garriga*, 636 So. 2d 658 (Miss. 1994).

Workers Compensations liens do not apply to UM proceeds. *Miss. Ins. Guaranty Assoc. v. Blakeney,* 51 So. 23 208 (Miss. App. 2009). Accordingly, a carrier does not need to seek approval from a court or workers compensation commission in order to pay UM proceeds.

Written Rejection/Minimum Coverage

Unless the insured rejects the coverage in writing, the policy must provide minimum UM coverage of at least 25,000/50,000/25,000. *See* Miss. Code Ann. §§ 83-11-101(1) and (2); 63-15-3.

The statute explains that "any insured named in the policy" can reject the coverage in writing. Miss. Code Ann. § 83-11-103(2). A statutorily required waiver of UM coverage can be obtained only from a fully informed insured. In other words, the waiver must be knowing and intelligent, meaning that the insured was "reasonably knowledgeable and informed of the costs and benefits of such UM coverage prior to signing the waiver." *Owens v. Mississippi Farm Bureau Cas. Ins. Co.*, 910 So.2d 1065, 1074 (Miss. 2005). The burden is on the carrier to demonstrate that a waiver was knowingly and intelligently made. *Honeycutt v. Coleman*, No. 2010-CT-01470-SCT (Miss. May 30, 2013). This can be accomplished by proof that an appropriate explanation of the ramifications of rejecting UM coverage was provided to the insured, or that the insured was a sophisticated purchaser of insurance or was otherwise informed.

Effective July 1, 2014, the UM statute was amended to create a new UM Rejection Form that, if substantially complied with, will be binding on all the insureds and would operate as an effective waiver of coverage.

There is no requirement of a written rejection of UM coverage above the minimum amount, and there is no duty on an agent to provide an explanation of such optional coverages. *Owens v. Mississippi Farm Bureau Cas. Ins. Co.*, 910 So.2d 1065, 1074 (Miss. 2005).

The statute does not require that the written rejection be maintained. In other words, the mere fact that a carrier cannot produce the written rejection does not automatically create a violation of the statute. The carrier is free to provide affidavits or other circumstantial evidence that an

insured at one time had signed a written rejection of coverage, and it is up to the insured to present proof to the contrary. *Travelers v. Stokes*, 838 So. 2d 270 (Miss. 2003).

Election of Remedies

If insured sued another tortfeasor, who was not an uninsured motorist, and obtained judgment for less than he sought, he cannot then claim that a different tortfeasor, who is uninsured, was actually the cause of his injuries. He is precluded from pursuing a UM claim. *Carson v. Colonial Ins. Co.*, 724 F. Supp 1225 (S.D. Miss. 1989).

Exclusions

Any exclusions that limit or reduce the available UM benefits below the minimum statutory amount are likely to be improper.

"Named driver" and "owned vehicle" exclusions have been found to be in conflict with the UM Act and are void and unenforceable. *Lowery v. State Farm Mut. Auto. Ins. Co.*, 285 So. 2d 767 (Miss. 1973) (owned vehicle); *Atlanta Cas. Co. v. Payne*, 603 So. 2d 343, 348 (Miss. 1992) (named driver).

However, liability offset provisons, which would serve to reduce or eliminate UM coverage, have been held to be valid. See Offsets and Exhaustion, above.

The exclusivity provision in the Worker's Compensation statute completely bars an employee from recovering UM benefits from his personal insurer when injured by a co-employee. *Wachtler v. State Farm Mut. Auto. Ins. Co.*, 835 So. 2d 23, 28 (Miss. 2003).

It is also important to keep in mind that any exclusion or limitation of coverage under the liability coverage will likely trigger uninsured motorist coverage.

Limiting Stacking – Fleet Policies

Since 2002, Mississippi has allowed a multiple-vehicle policy to limit the stacking available to the vehicles insured therein. It allowed a single fleet policy (which was a policy insuring 10 or more vehicles) to provide for a Non-Stacking, Single Limit policy, as long as that policy provided for at least 10 times the minimum limits. *See* § 83-11-102. In other words, up until July 1, 2013, Mississippi allowed the non-stacking of UM coverage if a single policy with multiple vehicles provided for coverage at least 250/500/250.

Effective July 1, 2013, the statute was amended to lower the 10 vehicle multiple to 4. *See* § 83-11-102. Carriers are now allowed to issue a single limit, non-stacking policy covering multiple vehicles as long as it provides coverage of 100/200/100. There is an Insurance Department form

carriers can use to disclose the availability of this non-stacking single limit and for an insured to make selections of coverages.

Property Damage Deductible

The UMPD deductible is $200. Miss. Code Ann. § 83-11-101.

Stacking

UM stacking is permitted for "Class I" insureds (named insureds and resident relatives), generally, and more limited for "Class II" (permissive drivers and guest passengers). *Meyers v. American States Ins. Co.*, 914 So. 2d 669, 674 (Miss. 2005). Class II insureds can only stack the accident vehicles' coverage with any of his or her own personal coverage (i.e. other coverage he or she qualifies as an "insured" on). A Class II insured does not have the right to stack an employer's uninsured motorist coverage unless policy language provides otherwise. *Deaton v. Mississippi Farm Bureau Cas. Ins. Co.*, 994 So. 164, 167 (Miss. 2008). Anti-stacking provisions in policies are void.

Hit and Run

A UM policy may include the requirement that actual "physical contact" occur between the insured and an unidentified motor vehicle.

An object that is simply thrown or tossed from one vehicle and hits the insured's vehicle has been held not to meet the physical contact requirement as the insured vehicle was neither hit by the unknown vehicle nor was any object struck by that vehicle propelling it into the insured's vehicle. *See Aetna Cas. & Sur. Co. v. Head*, 240 So. 2d 280 (Miss. 1970) (finding no physical contact in case involving a soft drink bottle being tossed by unknown operator into windshield of insured).

In many cases, however, the physical contact requirement can be met by indirect contact; that is, if the unknown vehicle is said to have contacted the insured through a medium of an intervening vehicle or object. For example, in *Southern Farm Bureau Cas. Ins. Co. v. Brewer*, the requirement was met when the unknown vehicle struck an object in the road thereby causing the object to be propelled into the insured vehicle. *Southern Farm Bureau Cas. Ins. Co. v. Brewer*, 507 So. 2d 369 (Miss. 1987). There, the Court emphasized that the injury-causing impact must have a "complete, proximate, direct and timely relationship with the first impact between the first hit-and-run vehicle and the intermediate [object]. In effect, the impact must be the result of an unbroken chain of events with a clearly definable beginning and ending, occurring in a continuous sequence." *Southern Farm Bureau Cas. Ins. Co. v. Brewer*, 507 So. 2d 369 (Miss. 1987).

However, the ruling in *Brewer* was based on Farm Bureau's policy language at the time. The Court stated that had the insurance company intended that the provision apply only where this is direct, as opposed to indirect physical contact, between the hit-and-run vehicle and the vehicle of the insured, it should have so provided in unmistakably clear language. Since the Farm Bureau policy was cable of two meaning, the construction most favorable to the insured was applied. *Southern Farm Bureau Casualty Ins. Co. v. Brewer*, 507 So. 2d 369 (Miss. 1987). Thus, in fact scenarios like *Brewer*, it appears that the policy language controls when deciding whether to exclude damages for indirect contract by debris propelled from a hit and run vehicle.

Valued Policy Law

Miss. Code Ann. § 83-13-5, known as the "Valued Policy Law" or "Valued Property Statute," provides that no insurer may issue fire insurance on property in an amount that exceeds the fair market value of the property. The statute also provides that when property is totally destroyed by fire, the insurer may not deny that the destroyed property was worth the full amount of insurance, and that full amount of insurance shall be the damages for the insured.

The valued property statute only operates in cases where the insured property is "totally destroyed by fire," which means there is the lack of a "substantial, usable remnant of the building surviving." *Home Ins. Co. v. Greene*, 229 So. 2d 576, 579 (Miss. 1969).

In addition, "a building insured against fire is a 'total loss' where, though only partly burned, it is rendered unfit for the purpose for which it was constructed, and there is an ordinance or law prohibiting reconstruction." *Palantine Ins. Co. v. Nunn*, 55 So. 44 (Miss. 1911).

The statute provides that when the insured property is totally destroyed by fire, the insurer may not deny that the destroyed property was worth the amount of the insurance, which amount is the measure of damages for the insured. *Mississippi Farm Bureau Mut. Ins. Co. v. Todd*, 492 So. 2d 919, 932 (Miss. 1986).

This statute is written into all fire insurance contracts as a matter of law and does not depend on specific language in the policy. *Harrison v. American Motorists Ins. Co.*, 245 So. 2d 577 (Miss. 1971).

The purpose of the statute is to prevent insurers from collecting premiums for an amount of coverage and then denying that the property's value equals the amount of coverage. *Todd*, 492 So. 2d at 932. The statute will allow the principles of indemnity to be violated to the extent an insured may be allowed to recover in excess of the insured's actual damages.

The valued property statute applies only to real property and is not available to the insured to establish the value of personal property destroyed by fire. *Home Ins. Co. v. Greene*, 229 So. 2d 576, 579 (Miss. 1969).

Vicarious Liability

Without some special relationship, an owner of an automobile is not liable for injuries negligently caused by a permissive driver. *Wood v. Nichols*, 416 So. 2d 659 (Miss. 1982).

The methods in which liability may be imputed from a permissive user to owner are agency, employment, negligent entrustment, conspiracy, joint enterprise, and ownership liability statutes. *Woods v. Nichols*, 416 So. 2d 659, 663-64 (Miss. 1982) (agency); *Dukes v. Sanders*, 124 So. 2d 122, 128 (Miss. 1960) (negligent entrustment); *Buford v. Horne,* 300 So. 2d 913 (Miss. 1974) (joint enterprise); *See* Miss. Code Ann. § 63-1-25 (joint and severally liability for the willful or negligent acts of a minor under seventeen while operating motor vehicle between minor and person who signed application for license or permit).

Wrongful Death

Brought by a beneficiary or personal representative, the following damages can be recovered in a wrongful death action: expenses of last illness, any conscious pain and suffering of the deceased, funeral expenses, the present net cash value of the deceased's work life expectancy (i.e. the total earnings the deceased would have realized throughout his lifetime, based on the average life expectancy) reduced to the present value and further reduced by the amount which the decedent would have spent on himself, and loss of society and companionship of the deceased (does not include 'grief'). Miss. Code Ann. § 11-7-13.